1999

The State of Utah v. Curtis John Miller : Brief of Appellant

Utah Court of Appeals

Edwin Stanton Wall; Wall Law Offices; Attorney for Defendant-Appellant.
J Frederic Voros, Jr.; Assistant Attorney General; Attorney for Plaintiff-Appellee.

Edwin S. Wall, A7446
WALL LAW OFFICES
68 South Main Street, Suite 800
Salt Lake City, Utah 84101
Phone Number: (801) 523-3445

Attorney for Defendant/Appellant

IN THE COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

STATE OF UTAH,	)	
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	Case No. 990417 - CA
	)	
CURTIS JOHN MILLER,	)	
	)	
Defendant/Appellant.		Priority No. 0 2

BRIEF FOR DEFENDANT-APPELLANT

Edwin Stanton Wall
WALL LAW OFFICES
800 McIntyre Building
68 South Main Street
Salt Lake City, Utah 84101
Telephone (801) 523-3445
Attorney for Defendant-Appellant

J Frederic Voros, Jr.
Assistant Attorney General, State of Utah
160 East 300 South, 6th Floor
P.O. Box 140811
Salt Lake City, Utah 84114-0811
Telephone (801) 366-0220
Attorney for the Plaintiff-Appellee

Edwin S. Wall, A7446
WALL LAW OFFICES
68 South Main Street, Suite 800
Salt Lake City, Utah 84101
Phone Number: (801) 523-3445

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Salt Lake City, Utah 84101
Telephone (801) 523-3445
Attorney for Defendant-Appellant

J Frederic Voros, Jr.
Assistant Attorney General, State of Utah
160 East 300 South, 6th Floor
P.O. Box 140811
Salt Lake City, Utah 84114-0811
Telephone (801) 366-0220
Attorney for the Plaintiff-Appellee

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SUBJECT MATTER AND APPELLATE JURISDICTION

District Court Subject Matter Jurisdiction

The Third Judicial District Court had original jurisdiction as the trial court in this criminal matter pursuant to U.C. § 78-3-4(1)

Court of Appeals Jurisdiction

The Utah Court of Appeals, which has appellate jurisdiction pursuant to U.C. § 78-2a-3(2)(e).

Order on Appeal

This is an appeal from the Judgement, Sentence (Commitment) issued April 27, 1999. (R. 122-123)

ISSUES ON APPEAL

First Issue on Appeal

Whether Count II charging Theft should have been merged with Count I charging Burglary.

Standard of Review for Merger

Whether Theft is a lesser included offense of Burglary is a question of law. *State v. Baker*, 671 P.2d 152 (Utah 1983). The standard of review for questions of law is for correctness. *State v. Souza*, 846 P.2d 1313, 1320 (Utah App.1993).

This issue is raised for the first time on appeal. Because trial counsel failed to make a timely objection or otherwise preserve this issue for appeal, review is sought on grounds of plain error. The standard of review for plain error is whether, absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant. *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993).

Second Issue on Appeal

Whether the State failed to present sufficient evidence to prove Burglary as charged in Count I.

Standard of Review for Sufficiency of Evidence for Burglary

When reviewing a jury verdict for sufficient evidence, this court must "review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury ... [and] reverse ... only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the

defendant committed the crime of which he was convicted." *State v. Hamilton*, 827 P.2d 232, 236 (Utah 1992) (citations omitted).

This issue is raised for the first time on appeal. Because trial counsel failed to make a timely objection or otherwise preserve this issue for appeal, review is sought on grounds of plain error. The standard of review for plain error is whether, absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant. *Dunn*, 850 P.2d at 1208.

Third Issue on Appeal

Whether the Court failed to adequately voir dire the jury so that counsel had an adequate opportunity to gain the information necessary to evaluate the bias of the jury in favor of prosecutor, law enforcement and the witnesses.

Standard of Review for Sufficiency of Voir Dire to Establish Prejudice or Bias

Courts review challenges to a trial judge's voir dire under an "abuse of discretion" standard. *Doe v. Hafen*, 772 P.2d 456, 457-58 (Utah App.1989), cert. denied, 800 P.2d 1105 (Utah 1990). A trial court abuses its discretion and thus commits reversible error when, "considering the totality of the questioning, counsel [is not] afforded an adequate opportunity to gain the information necessary to evaluate jurors." *State v. Bishop*, 753 P.2d 439, 448 (Utah 1988).

This issue is raised for the first time on appeal. Because trial counsel failed to make a timely objection or otherwise preserve this issue for appeal, review is sought on grounds of plain error. The standard of review for plain error is whether, absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant. *Dunn*, 850 P.2d at 1208.

Fourth Issue on Appeal

Whether the State failed to present sufficient evidence to establish market value as charged in Count II for Theft.

Standard of Review for Sufficiency of Evidence of Market Value

When reviewing a jury verdict for sufficient evidence, this court must "review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury ... [and] reverse ... only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted."*Hamilton,* 827 P.2d at 236.

This issue is raised for the first time on appeal. Because trial counsel failed to make a timely objection or otherwise preserve this issue for appeal, review is sought on grounds of plain error. The standard of review for plain error is whether, absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant. *Dunn*, 850 P.2d at 1208.

Fifth Issue on Appeal

Whether the State Failed to present sufficient evidence to establish an operable motor vehicle as charged in Count II for Theft.

Standard of Review for Sufficiency of Evidence Showing an Operable Motor Vehicle

When reviewing a jury verdict for sufficient evidence, this court must "review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of

the jury ... [and] reverse ... only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *Hamilton*, 827 P.2d at 236.

This issue is raised for the first time on appeal. Because trial counsel failed to make a timely objection or otherwise preserve this issue for appeal, review is sought on grounds of plain error. The standard of review for plain error is whether, absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant. *Dunn*, 850 P.2d at 1208.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES RULES AND REGULATIONS REQUIRING INTERPRETATION IN THIS APPEAL

FEDERAL CONSTITUTIONAL PROVISIONS

United States Constitution, Fifth Amendment
United States Constitution, Fourteenth Amendment
United States Constitution, Sixth Amendment

STATE CONSTITUTIONAL PROVISIONS

Utah Constitution, Article I, § 7
Utah Constitution, Article I, § 10
Utah Constitution, Article I, § 12

STATUTES

U.C. § 76-6-202(2)
U.C. § 76-6-404

STATEMENT OF THE CASE

Nature of the Case

This is an appeal as of right of appellant's criminal convictions as the defendant in the district court on two second degree felony counts: Burglary and Theft.

Course of Proceedings

A jury trial was held on March 24, 1999, in the present matter before the Honorable Pat B. Brian, Judge, Third Judicial District Court, Salt Lake County, Utah. (R. 173). The jury returned a verdict of guilty. (R. 111). The defendant was sentenced on April 27, 1999. (R. 345) at which time the Court entered its Judgment, Sentence (Commitment), (dated April 27, 1999)(R. 122 & 123). Appellant filed a Notice of Appeal on May 4, 1999. (R. 129). Pursuant to the stipulated motion extending time, the Brief of Appellant is due in this matter on May 9, 2000.

Disposition in the District Court

On March 24, 1999, appellant was convicted by the verdict of a jury of Burglary, a second degree felony pursuant to U.C. § 76-6-202(2) and Theft, a second degree felony pursuant to U.C. § 76-6-404. (R. 111). On April 27, 1999, the defendant was sentenced to serve a term for the indeterminate period of 1 to 15 years and fined $10,000.00 for the crime of Burglary and for the indeterminate period of 1 to 15 years and fined $10,000.00 for the crime of Theft, said sentence running concurrently. Judgment, Sentence (Commitment), (dated April 27, 1999). (R. 123).

Statement of Relevant Facts

On May 27th, 1998, Mr. Miller was driving a U-Haul van when he was stopped by law enforcement officers. (R. 225, 230). Just prior to the stop, law enforcement officers observed two white males in the van and two Hispanic males back their car up to the rear of the van and saw property being moved out of the van and into the Hispanic males' car trunk. (R. 228). After this exchange of property, officers observed one of the males go to a Mercedes and remove a licence place and place it on the van. (R. 229-230).

When the van was stopped, law enforcement officers found Mr. Miller, the appellant, and another person identified as David Christiansen in the van. (R. 230, 236). At trial, the law enforcement officers testified that Mr. Miller was driving the van at the time. (R. 236). They further claimed Mr. Miller consented to the search of the van and that Mr. Miller identified the property in the van as belonging to him. (R. 236-237). Inside the van, the law enforcement officers located a generator, a Fore Runner, and a number of rifles and handguns. (R. 237-238). The officers testified that they identified the Fore Runner as belonging to Mrs. Patsy Dorrans and that they contacted her with regard to the matter. (R. 239). The officers further claimed that they located the registration to the Fore Runner in Mr. Millers pocket. (R. 240).

Officer Kevin Peterson testified that he read Mr. Miller his constitutional rights. (R. 251). Thereafter, Officer Peterson supposedly said to Mr. Miller, "so the van is yours but the property inside is stolen, right?" (R. 252) To which Mr. Miller purportedly said, "yes." (R. 252). Officer Peterson further stated that Mr. Miller did not say how he come into possession of the property. (R. 252-253). However, Mr. Miller explained that he felt he was entitled to the property because he felt

he had been cheated by the Dorrans and their attorney on a land deal to the sum of $5,000.00. (R. 252).

The State called Mrs. Dorrans to testify. She testified that she and her husband owned property, including a cabin, in the Echo Creek Ranches located in Summit County, Utah. (R. 256). She testified that she owned the Fore Runner that had been found by the law enforcement officers in the van that had been driven by Mr. Miller (R. 257-258) and that she purchased it about one year prior to the incident (R. 258). She further testified where she had kept it stored. (R. 259, l. 20-25 to R. 260, l. 10). She never testified that the four wheeler was operable, that it had a functional engine, that she had ever been able to start it, run it, or that it was in any respect operational.

According to Mrs. Dorrans, her husband knew Mr. Miller prior to May 27th of 1998. (R. 261, l. 3-4). She testified Mr. Miller had done some work on the Dorrans's home in Salt Lake and had put a roof on a trailer that was located on the property in Summit County. (R. 261, l. 8-10). She testified that the cabin had both a keyed and a keyless entry, and that there were keys hidden somewhere at the cabin. (R. 261). However, when Mrs. Dorrans was asked if Mr. Miller was told of the code to the keyless entry, she speculated saying, "If he wasn't he probably knew where the extra set of keys was, either way, so. (R. 261, l. 19-23). Mrs. Dorrans testified about the replacement cost of the items taken (R. 263, l. 2-22), however she never testified about the applicable market value, age or condition of the property.

Trial in the present case was held on March 24, 1999. (R. 173). During the voir dire in the present case numerous petit jurors informed the trial court that they were closely associated with the prosecuting attorney (R. 194, l. 15-21; R. 195, l. 4-6; R. 16-25; 196, l. 4-10, 15-21, 25; R. 197 l. 1-6,

10-15, 20-25; R. 198, l. 9-13), with law enforcement officers (R. 199, l. 7-11, 14-15; R. 200 l. 5-11, 12-18, 25; R. 201, l. 5-8, l. 9-15, l. 20-25; R. 202, l. 7-15, 20-25), or with witnesses (R. 198, l. 20-24). A number of the petit jurors who addressed these questions cannot be identified, and are reflected in the transcript as "Mr. ?" or "Mrs. ?" (R. 194, l. 15-21; R. 195, l. 16-25; R. 198, l. 9-13), with law enforcement officers (R. 199, l. 7-11, 14-15; R. 200 l. 5-11. 12-18; R. 201, l. 5-8, 9-15; R. 202, l. 7-15), or with witnesses (R. 198, l. 20-24).

Numerous petit jurors also informed the court that they had been victims of crimes similar to that with which Mr. Miller stood charged. (R. 205, l. 22-25; R. 206, l. 2-6; 8-11; 14-17; 20-24; R. 207. l. 1-4, 6-7, 9-10, 12-13, 16-21, 5-6, 9-10, 11-13, 15-17, 20-21). And a number of jurors informed the court that either they personally or family members had been charged with criminal offenses. (R. 208, l. 25; R. 209, l. 13-16; R. 21-25, R. 210, l. 13-14, 16-18, 25; R. 1-3). The trial court asked generally whether those members of the petit jury who had been victims of crime or had "a run in with the law" whether those experiences would prevent them from being fair and impartial. (R. 211). The court also asked whether any jurors had anything in their life's experiences which would prevent them from listening to the evidence, following the law and deciding the case "fairly and impartially." (R. 214 l. 21 through 215, l. 3, l. 17-22).

SUMMARY OF ARGUMENTS

ARGUMENT I

Merger of Burglary and Theft

Count II charging Theft should have been merged with Count I charging Burglary. In the present case, the Defendant was charged with burglary of the dwelling of the Dorrans, and also with theft of the Dorrans's property from that dwelling. (R. 10-12). The Theft and Burglary charges are substantially related in this case. Under Utah law, as set forth in *State v. Pitts*, 738 P.2d 113 (Utah 1986) theft is a lesser included offense of burglary where there is a significant relationship between these two offenses. Mr. Miller's conviction for Theft should be reversed.

ARGUMENT II

Lack of Sufficiency of Evidence for Burglary

The State failed to present sufficient evidence to prove Burglary as charged in Count I. Pursuant to U.C. § 76-6-202(2) the State is required to prove Mr. Miller "entered or remained in the dwelling" of the Dorrans "with the intent to commit a theft." There is no evidence in the record that Mr. Miller was ever in the cabin, nor can any reasonable inference be drawn from the evidence to establish Mr. Miller ever entered or remained in the cabin with the intent to commit a theft. The jury could not have decided Mr. Miller committed the burglary without engaging in pure speculation.

ARGUMENT III

Lack of Sufficiency of Voir Dire to Establish Prejudice or Bias

The Court failed to adequately voir dire the jury, violating Mr. Millers right to a jury trial under Utah Constitution, Article I, § 10 and the Sixth Amendment of the Federal Constituiton. During the voir dire in the present case numerous petit jurors informed the trial court that they were closely associated with the prosecuting attorney, law enforcement officers or witnesses. The court did not individually or collectively question the petit jurors regarding whether their association would cause them to give more credibility, weight, or favor to the prosecution's witnesses. Nothing in the record indicates the judge did anything to determine whether any of the jurors had merely 'light impressions' or impressions which are 'strong and deep' and which will affect the juror's impartiality. Additionally, the record is so inadequate, with certain jurors being left unidentified, that it is not possible to determine whether those who indicated partiality were ultimately on the jury. The record preventing Mr. Miller from being able to either gain additional fact or establish which of the petit jurors decided the case. The present case should be reversed and remanded

ARGUMENT IV

Sufficiency of Evidence of Market Value

The State failed to present sufficient evidence to establish market value. Market-value test is the appropriate test to be used in determining the value of stolen property. Market value is the fair market value at the time and place where the alleged crime was committed; and the purchase price alone is generally not sufficient to prove the value of goods on the date they were stolen. In the

present case there is no evidence as to the market value of the items stolen on the date of the offense. The only competent evidence of value had to do with replacement cost. not the fair market value. The Court should therefore vacate defendant's felony conviction. for Theft.

ARGUMENT V

Sufficiency of Evidence to Show an Operable Motor Vehicle

The State Failed to present sufficient evidence to establish an operable motor vehicle as charged in Count II for Theft. The state never presented any evidence that the four wheeler was operable. The jury could do nothing more than merely speculate that the four wheeler was operable. The evidence was not sufficient to convict Mr. Miller of Theft for taking an operable motor vehicle.

ARGUMENTS

Overview Regarding Plain Error

On appeal Mr. Miller raises issues with regard to the manner in which his trial was conducted. Mr. Miller asserts that he was deprived of both his federal and state constitutional rights to due process by a fair and impartial jury. United States Constitution, Fifth Amendment, Fourteenth Amendment, and Sixth Amendment; Utah Constitution, Article 1, §§ 7 and 12. Because no objection was made in the trial court with respect to the issues raised here, appellant must show plain error on appeal. The two-pronged test for determining whether plain error has occurred is articulated in *State v. Eldridge*, 773 P.2d 29 (Utah) cert. denied, 493 U.S. 814, 110 S.Ct. 62, 107 L.Ed.2d 29 (1989). First, the error in the trial court must be obvious from the record. Id. at 35. Second, the error must affect the substantial rights of the appellant. Id.; See also *State v. Young*, 853 P.2d 327, 349 (Utah 1993)(a showing of prejudice). Mr. Miller has shown plain error with regard to the issues raised in this appeal, as set forth below.

ARGUMENT I

Merger of Burglary and Theft

Count II charging Theft should have been merged with Count I charging Burglary. In the present case, the defendant was illegally convicted and sentenced on the theft charge, as the theft charge is a lesser included offense to the burglary. In the present case, the Defendant was charged with burglary of the dwelling of the Dorrans, and also with theft of the Dorrans's property from that

dwelling. (R. 10-12). The Theft and Burglary charges are substantially related in this case, and because the Theft was a lesser included charge of Burglary, the Theft conviction should be reversed..

In *State v. Pitts*, 738 P.2d 113 (Utah 1986) the Utah Supreme Court addressed the question of whether a theft was a lesser included offense of burglary. The *Pitts* court applied the test it articulated in *State v. Baker*, 671 P.2d 152 (Utah 1983) which provides that an offense is included in a greater offense when there is "some relationship" between them and "some overlap" in the proof required to establish the elements of both offenses (e.g., the intent requisite to commit theft). See *State v. Hill*, 674 P.2d 96 (Utah 1983) (theft may be a lesser included offense of aggravated robbery). The *Pitts* court held that the theft was a lesser included offense of burglary because a significant relationship existed between these two offenses because the same specific intent is required for each. *Pitts*, 728 P.2d at 116. The court stated that fact that the intent to commit theft is not a necessary element of all burglaries does not obviate the relationship between the two offenses in this case. Id. In the present case, Mr. Miller was illegally tried, convicted and sentenced for Theft. Mr. Miller's conviction for Theft should be reversed.

ARGUMENT II

Lack of Sufficiency of Evidence for Burglary

The State failed to present sufficient evidence to prove Burglary as charged in Count I. Pursuant to U.C. § 76-6-202(2) the State is required to prove Mr. Miller "entered or remained in the dwelling" of the Dorrans "with the intent to commit a theft." In the present case there is no evidence that Mr. Miller ever entered into the Dorian's cabin with the intent to commit a theft. None of the evidence

introduced at trial places Mr. Miller at the Dorrans's cabin at any time on May 26th or 27th of 1998; much less in the cabin.

When reviewing a jury verdict for sufficient evidence, this court must review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury ... [and] reverse ... only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *State v. Hamilton,* 827 P.2d 232, 236 (Utah 1992) (citations omitted). In a case involving circumstantial evidence, the Court must determine (1) whether there is any evidence that supports each and every element of the crime charged, and (2) whether the inferences that can be drawn from that evidence have a basis in logic and reasonable human experience sufficient to prove each legal element of the offense beyond a reasonable doubt. *State v. Brown,* 948 P.2d 337, 344 (Utah 1997)("A guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt.").

There is no evidence in the record that Mr. Miller was ever in the cabin, nor can any reasonable inference be drawn from the evidence to establish Mr. Miller ever entered or remained in the cabin with the intent to commit a theft.

The evidence shows Mr. Dorrans new Mr. Miller prior to May 27th of 1998. (R. 261, l. 3-4). He was a friend of Mr. Dorrans and had previously done some work on the Dorrans's home in Salt Lake and had put a roof on a trailer that was located on the property in Summit County. (R. 261, l. 8-10).

The evidence also shows that there were keys hidden at the cabin, and the cabin had a keyless entry. (R. 261, l. 15-18). When Ms. Dorrans was asked:

> Q: And when Mr. Miller was working at your cabin putting on the roof, was he advised of the code for the keyless entry?
> A: If he wasn't he probably knew where the extra set of keys was, either way, so.
> (R. 261, l. 19-23)
> On cross examination Mrs. Dorrans testified :
> Q: But you testified that you'd given him the combo to the keyless door lock and possibly the location of the keys to you[r] cabin?
> A: He had the keys. He knew where the keys were because he did some work up there.
> (R. 267, l. 13-17)

Mrs. Dorrans's testimony shows she was purely speculating as to whether Mr. Miller had access to the house. She never testified or even indicated that Mr. Miller had ever been inside the cabin. She did not testify that she had either given Mr. Miller the code to the keyless entry, notified him of the location of the keys, or given him keys. Nor did she testify that she was present when her husband or someone else had done so. There was no evidence presented at trial that established, much less indicated, that Mr. Miller was in Summit County, much less in the Dorrans's cabin, on May 27th of 1998. The jury could not have decided Mr. Miller committed the burglary without engaging in pure speculation.

ARGUMENT III

Lack of Sufficiency of Voir Dire to Establish Prejudice or Bias

The Court failed to adequately voir dire the jury so that counsel had an adequate opportunity to gain the information necessary to evaluate the bias of the jury in favor of prosecutor, law enforcement and the witnesses. The court committed plain error in conducting the voir dire at trial.

The trial court committed plain error in the present case in its failure to ask sufficient questions during voir dire to adequately test the impartiality of the prospective jurors, substantially impairing the appellant's ability to exercise peremptory and for-cause challenges.

Voir dire has two functions, "the detection of bias sufficient to challenge for cause," and "the collection of date to permit informed exercise of the peremptory challenge." *State v. Woolley*, 810 P.2d 440, 455 (Utah App. 1991). Utah appellate courts review the trial court's management of jury voir dire under an abuse of discretion standard. *Evans v. Doty*, 824 P.2d 460, 462 (Utah App. 1991), cert. denied, 804 P.2d 1383 (Utah 1992). Generally, on appeal, an appellant must show that a juror's responses to voir dire questions or other facts in the record raised an inference that the juror harbored some bias, and then demonstrate that the trial court failed to adequately probe and then rebut that inference. *State v. Jonas*, 793 P.2d 902, 906-07 (Utah App.) cert. denied, 804 P.2d 1232 (Utah 1990). In addition, a appellant must show that the failure to remove the juror actually prejudiced his case. I, 899 P.2d 393, 398 (Utah 1994). *State v. Saunders*, 893 P.2d 584, 587 (Utah App. 1995).

In the present case the defendant was deprived of due process, and prejudiced by the voir dire and jury selection because the bias due to the petit juror's relationships with the prosecutor, law enforcement and the witnesses was not adequately investigated by the trial court. The Menzies standard provides that, "[t]o prevail ... a defendant must demonstrate prejudice, viz., show that a member of the jury was partial or incompetent." *Menzies*, 889 P.2d at 398. " 'So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the [Constitution] was violated.' " Id. (quoting *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S.Ct. 2273, 2277, 101 L.Ed.2d 80 (1988)). In *Woolley*, 810 P.2d 440 the Court of Appeals

directed trial courts as to the appropriate procedure if a juror's responses raise any question or inference of bias: "Once a juror's impartiality has been put in doubt, a trial judge must investigate by further questions to determine if the juror has merely 'light impressions' or impressions which are 'strong and deep' and which will affect the juror's impartiality." Id. at 443.

During the voir dire in the present case numerous petit jurors informed the trial court that they were closely associated with the prosecuting attorney (R. 194, l. 15-21; R. 195, l. 4-6; R. 16-25; 196, l. 4-10, 15-21, 25; R. 197 l. 1-6, 10-15, 20-25; R. 198, l. 9-13) , with law enforcement officers (R. 199, l. 7-11, 14-15; R. 200 l. 5-11. 12-18, 25; R. 201, l. 5-8, l. 9-15, l. 20-25; R. 202, l. 7-15, 20-25), or with witnesses (R. 198, l. 20-24).

Numerous petit jurors also informed the court that they had been victims of crimes similar to that with which Mr. Miller stood charged. (R. 205, l. 22-25; R. 206, l. 2-6; 8-11; 14-17; 20-24; R. 207. l. 1-4, 6-7, 9-10, 12-13, 16-21, 5-6, 9-10, 11-13, 15-17, 20-21). And a number of jurors informed the court that either they personally or family members had been charged with criminal offenses. (R. 208, l. 25; R. 209, l. 13-16; R. 21-25, R. 210, l. 13-14, 16-18, 25; R. 1-3). The trial court asked generally whether those members of the petit jury who had been victims of crime or had "a run in with the law" whether those experiences would prevent them from being fair and impartial. (R. 211, l. 4-16). However, such is not the case with respect to those who were closely associated with te prosecutor, law enforcement or witnesses.

The court did not individually or collectively question the petit jurors who indicated they where associated with the prosecuting attorney, law enforcement officers, or witnesses regarding whether their association would cause them to give more credibility, weight, or favor to the prosecution's

witnesses.[1] Nothing in the record indicates the judge did anything to determine whether any of the jurors had merely 'light impressions' or impressions which are 'strong and deep' and which will affect the juror's impartiality.

As indicated above, Mr. Miller has not only been prejudiced, not only because the Court failed to conduct an adequate voir dire, but also because there is not a sufficient record on appeal. Utah's standard a defendant must, show that a member of the jury was partial or incompetent. Yet, in the present case there is no transcript record of the trial proceedings establishing who was finally selected to be on the jury from the petit jury. (See, R. 217). In addition, it is not possible to determine who many of the petit jurors were who indicated they were closely associated with the prosecutor or law enforcement; they appear in the record as either "Mr. ?" or "Mrs. ?" (R. 194, l. 15-21; R. 195, l. 16-25; R. 198, l. 9-13) , with law enforcement officers (R. 199, l. 7-11, 14-15; R. 200 l. 5-11. 12-18; R. 201, l. 5-8, 9-15; R. 202, l. 7-15), or with witnesses (R. 198, l. 20-24). The defendant in the present case, due to the condition of the record, is left without enough of a record

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[1] The Court did pose the following general question, although such a question would not discern whether a juror would give more credibility, weight, or favor to the prosecution's witnesses:

> Is there anything in your lifes experience, whether the Court has asked you about it or omitted to ask you about it, that would prevent you from listening to the evidence presented in the courtroom today, follow the law as given to you by the judge and in deciding the case fairly or impartially? Anyone who simply for whatever reason may be unwilling or unable to do that?
>
> * * *
>
> All right. The Court will ask the question again. . . is there anyone who for any reason cannot or will not listen to the evidence, follow the law, and decide the case fairly and impartially irrespective of the consequences?

(R. 214 l. 21 through 215, l. 3, l. 17-22)

to identify which members of the petit jury indicated they were partial or whether those petit jurors made it onto the jury.

However, hand in hand with placing the burden upon the defendant to show prejudice is the requirement that once a juror's impartiality has been put in doubt, a trial judge must investigate by further questions to determine if the juror has merely 'light impressions' or impressions which are 'strong and deep' and which will affect the juror's impartiality." In the present case, the trial judge did not investigate whether any of the petit jurors views toward the prosecutor, law enforcement, or the government's witnesses were lightly held or strong and deep.

The trial court did nothing to determine whether the jurors impressions were so deep that they would influence who each juror would believe in coming to their verdict. Clearly, the trial court elicited sufficient facts from the petit jurors to know there were grounds for concern regarding the partiality of the petit jurors. The trial judge did not conduct an adequate investigation regarding the partiality of the petit jurors. Finally, the record is so inadequate it is not possible to determine whether those who indicated partiality were ultimately on the jury. The present case should be reversed and remanded

ARGUMENT IV

Sufficiency of Evidence of Market Value

The State failed to present sufficient evidence to establish market value. In *State v. Logan*, 563 P.2d 811, 813 (Utah 1977), the Utah supreme court held that "the market-value test [is] the appropriate test to be used in determining the value of stolen property not otherwise provided for in

our statute." *See also State v. Slowe*, 728 P.2d 110, 112 (Utah 1986). The court defined market value as the "fair market value at the time and place where the alleged crime was committed" and defined fair market value as "what the owner could expect to receive, and the amount a willing buyer would pay to the true owner for the stolen item." *Logan*, 563 P.2d at 813 (footnotes omitted). (FN5)

In *State v. Lyman*, 966 P.2d 278, 283 (Utah App. 1998) the Court of Appeals noted that under the applicable definition of "market value" that the purchase price alone is generally not sufficient to prove the value of goods on the date they were stolen. Id. at 283. In addressing the need for evidence of the market price the *Lyman* court relied in part upon, *United States v. Thweatt*, 433 F.2d 1226, 1232 (D.C.Cir.1970); in which the Federal Circuit Court stated that " '[a] fact which distinguishes a violation punishable by imprisonment for not more than one year from a violation punishable by imprisonment for ten years cannot be permitted to rest upon conjecture or surmise.' "

In this case there is no evidence as to the market value of the items stolen on the date of the offense. The only evidence of value at trial was presented through the testimony of Mrs. Dorrans (R. 263) and Exhibit 17 (R. 85). Exhibit 17 is a list with the heading "Items of Property Stolen from Richard and Patsy Dorrans," with two columns, one column titled "Item" and the other "Value." When Mrs. Dorrans was shown Exhibit 17 at trail the following colloquy occurred:

> Q: Let me show you what's been marked as State's Exhibit 17 and ask you if you can identify that exhibit.
> A: That's a list of most of the things that was taken, it looks like.
> Q: Are those items that were taken out of your cabin in Summit County, Utah?
> A: Yes, it was.
> Q: And does it include items that were shown in photographs that have been introduced today as well as the weapons that have been marked and identified as exhibits in this case?

A: Most of them. There was just a few things we didn't get back.
Q: And the values assigned to those items, did you and your husband arrive at those values?
A: **No, sir. I think it would cost a lot more to replace them than $10,000.**
Q: So you maintain those values are conservative?
A: Very conservative.
(R. 263, l. 2-22)(emphasis added).

No one other than Mrs. Dorrans testified as to value in the present case, and no one ever testified as to the source of the values reflected in State's Exhibit 17. Moreover, two important facts are clear from Mrs. Dorrans's testimony. First, she did not adopt the values reflected in State's Exhibit 17, much less prepare the list. Secondly, and more importantly, she was testifying about the replacement cost of the property and not the fair market value. She did not testify as to the age or condition of the property. Moreover, the State presented no evidence concerning the age or condition of the property at the time of the offense or the rate at which the property would depreciate. Thus, the jury had no basis upon which to conclude that the value of the equipment on the date of the offense equaled or exceeded $5,000, or even $1,000. The Court should therefore vacate defendant's felony conviction.

ARGUMENT V

Sufficiency of Evidence to Show an Operable Motor Vehicle

The State Failed to present sufficient evidence to establish an operable motor vehicle as charged in Count II for Theft. In the present case, Count II included as an alternative that the defendant committed Theft in violation of U.C. § 76-6-404(b). Specifically, the Amended Information alleged Mr. Miller exercised unauthorized control over "an operable motor vehicle, to wit: a Honda-4

Runner." Thus, one of the inherent requirements of the offense is that there be evidence showing that the Honda-4 Runner was operable at the time of the offence.

In the present case, Mrs. Dorrans identified the vehicle in question as a four track, saying "That's my four track, I just purchased it about a year before this." (R. 258, l. 24-25). She further testified where she had kept it stored. (R. 259, l. 20-25 to R. 260, l. 10). She never testified that the four wheeler was operable, that it had a functional engine, that she had ever been able to start it, run it, or that it was in any respect operational. The jury could do nothing more than merely speculate that the four wheeler was operable. The evidence was not sufficient to convict Mr. Miller for taking an operable motor vehicle under Count II.

CONCLUSION

Count II charging Theft should have been merged with Count I charging Burglary. The Theft and Burglary charges are substantially related in this case. Mr. Miller's conviction for Theft should be reversed.

The State failed to present sufficient evidence to prove Burglary as charged in Count I. There is no evidence that Mr. Miller was ever in the cabin, nor can any reasonable inference be drawn from the evidence to establish Mr. Miller ever entered or remained in the cabin with the intent to commit a theft. The jury could not have decided Mr. Miller committed the burglary without engaging in pure speculation. The Burglary conviction should be reversed.

The Court failed to adequately voir dire the jury. During the voir dire numerous petit jurors informed the trial court that they were closely associated with the prosecuting attorney, law enforcement officers or witnesses. The court did not individually or collectively question the petit jurors regarding whether their association would cause them to give more credibility, weight, or favor to the prosecution's witnesses. The defendant was denied a fair trial because the jury was improperly questioned. Thus, his convictions should reversed and the case remanded

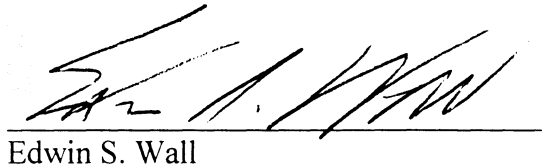
Finally, the State failed to present sufficient evidence to establish either market value or that the motor vehicle was operable with respect to the Theft charged in Count II. The jury could do nothing more than merely speculate regarding these facts, which requires the Theft conviction be reversed.

For the foregoing reasons, the present case should be reversed and remanded to the Third Judicial District Court.

Relief Sought

For the foregoing reasons the lower court seriously erred in the trial and conviction of the appellant. The appellant respectfully requests that this Court reverse the district court and remand this case for a new trial.

Respectfully submitted this 1st day of May, 2000.

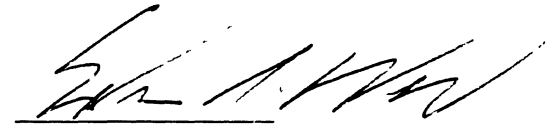


Edwin S. Wall
Attorney for the Defendant-Appellant

Certificate of Service

I, Edwin S. Wall, certify that on 9th day of May 2000, I caused true and correct copies of the foregoing document, were served by mailing the same by first class mail, postage prepaid, to:

J Frederic Voros, Jr.
Assistant Attorney General, State of Utah
160 East 300 South, 6th Floor
P.O. Box 140811
Salt Lake City, Utah 84114-0811
Ph: (801) 366-0220/Fx: 366-0221



Edwin S. Wall, Attorney at Law

ADDENDUM TO THE BRIEF

List of Parts of the Record

Applicable Federal Constitutional Provisions

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Applicable Utah Constitutional Provisions

Utah Const. Art. 1, § 7

No person shall be deprived of life, liberty or property, without due process of law.

Utah Const. Art. 1, § 10

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

Utah Const. Art. 1, § 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Applicable Statutory Provisions

§ 76-6-202. Burglary

(1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

§ 76-6-404. Theft--Elements

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

§ 76-6-412 Theft --Classification of offenses --Action for treble damages.

(1) Theft of property and services as provided in this chapter shall be punishable:

(a) as a felony of the second degree if the:

(i) value of the property or services is or exceeds $5,000;

(ii) property stolen is a firearm or an operable motor vehicle;

(iii) actor is armed with a dangerous weapon, as defined in Section 76-1-601, at the time of the theft; or

(iv) property is stolen from the person of another;

(b) as a felony of the third degree if:

(i) the value of the property or services is or exceeds $1,000 but is less than $5,000;

(ii) the actor has been twice before convicted of theft, any robbery, or any burglary with intent to commit theft; or

(iii) in a case not amounting to a second-degree felony, the property taken is a stallion, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack, jenny, swine, poultry, or a fur-bearing animal raised for commercial purposes;

(c) as a class A misdemeanor if the value of the property stolen is or exceeds $300 but is less than $1,000; or

(d) as a class B misdemeanor if the value of the property stolen is less than $300.

Robert W. Adkins, #0028
Summit County Attorney
Summit County Courthouse
P. O. Box 128
Coalville, Utah 84017
Telephone (801) 336-4468
Attorney for Plaintiff

IN THE THIRD DISTRICT COURT OF SUMMIT COUNTY
STATE OF UTAH

STATE OF UTAH,	:	JUDGMENT AND COMMITMENT
PLAINTIFF	:	
VS.	:	
CURTIS J. MILLER, D.O.B. 12-27-50	:	CRIMINAL NO. 981600103
DEFENDANT.	:	

On the 27th day of April, 1999, appeared Terry L. Christiansen, Chief Deputy Summit County Attorney, attorney for the State of Utah, and the defendant appeared in person and by counsel, John Lish.

IT IS ADJUDGED that the defendant has been convicted upon a plea of guilty of the offenses of Burglary, a Second Degree Felony, and Theft, a Second Degree Felony, as charged in Counts I and II of the Information; the court having asked if the defendant had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

Cert to Jail
Ust. Prison
3d of Pardon

IT IS ADJUDGED that the defendant be confined and imprisoned at the Utah State Prison for the indeterminate period of 1 to 15 years and is fined $10,000.00 as provided by law for the crime of Burglary, a Second Degree Felony.

IT IS ADJUDGED that the defendant be confined and imprisoned at the Utah State Prison for the indeterminate period of 1 to 15 years and is fined $10,000.00 as provided by law for the crime of Theft, a Second Degree Felony.

IT IS ORDERED that the Summit County Sheriff, D. Fred Eley, take the said defendant, without delay, to the Utah State Prison, Draper, Utah, where said defendant shall then and there be confined and imprisoned in accordance with this Judgment and Commitment.

IT IS FURTHER ORDERED that the sentences imposed herein run concurrent.

DATED this 27 day of April, 1999.

BY THE COURT:

Pat B. Brian
District Court Judge

SUMMIT COUNTY OF UTAH

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Judgment and Commitment, postage prepaid, this 27th day of April, 1999, to John Lish, attorney for defendant, at 341 South Main Street, Suite #300, Salt Lake City, Utah, 84111.